

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In re

CUSTOMS AND TAX ADMINISTRATION
OF THE KINGDOM OF DENMARK
(SKATTEFORVALTNINGEN) TAX
REFUND LITIGATION

This document relates to: 1:18-cv-05374
1:18-cv-08655

MASTER DOCKET

Case No.: 1:18-md-02865-LAK

DEL MAR ASSET MANAGEMENT
SAVINGS AND RETIREMENT PLAN,
FEDERATED LOGISTICS LLC 401K
PLAN, and DAVID FREELOVE,

Third-Party Plaintiffs,

-against-

ED&F MAN CAPITAL
MARKETS, LTD.,

Third-Party Defendant.

**AMENDED COUNTERCLAIMS OF THIRD-PARTY DEFENDANT
ED&F MAN CAPITAL MARKETS, LTD.**

Third-Party Defendant ED&F Man Capital Markets, Ltd. (“ED&F”), by and through its attorneys, Binder & Schwartz LLP, and pursuant to Rule 15 of the Federal Rules of Civil Procedure, submits its Amended Counterclaims against Third-Party Plaintiffs Del Mar Asset Management Savings and Retirement Plan and Federated Logistics LLC 401K Plan (collectively, the “Plans”). ED&F’s Answer and Affirmative Defenses are not hereby amended.

FIRST COUNTERCLAIM AGAINST THIRD-PARTY PLAINTIFFS
DEL MAR ASSET MANAGEMENT SAVINGS AND
RETIREMENT PLAN AND FEDERATED LOGISTICS LLC 401(K) PLAN
(Indemnification)

1. In 2013 and 2014, the Plans and ED&F entered into Custody Agreements (the “Agreements”) that established ED&F’s contractual obligations as the Custodian for each of the Plans. The Agreements set forth the terms and condition of business between ED&F as the “Plans” as the Clients.

2. The Plans’ Custody Agreements with ED&F are attached hereto as Exhibits A and B.¹

3. Pursuant to the binding terms of the Agreement, the Plans maintained “responsibility for the selection, acquisition and disposal of the Client Property.” (Exs. A and B, at 11(m)).

4. Client Property is defined as (i) “any securities (including evidence thereof, evidence of title thereto and all rights in respect thereof) deposited or transferred by the Client or on the Client’s behalf to the Custodian or a Sub-Custodian or collected by the Custodian or a Sub-Custodian for the Client’s account”; and (ii) all “cash in any currency arising out of or in connection with the Client Securities and any amounts standing to the credit of the Client Cash Account.” (Exs. A and B, at 1.1)

5. ED&F and the Plans explicitly agreed that ED&F “does not act as manager or investment adviser to” the Plans. (Exs. A and B, at 11(m)).

¹ The parties to the Del Mar agreement are ED&F Man and Hamlyn LP. Del Mar was a limited partner in Hamlyn LP.

6. In accordance with the parties' respective obligations under the Agreement, the Plans conceived, structured, and directed each of the Danish securities transactions (the "Danish Transactions") that ED&F executed on behalf of the Plans.

7. Pursuant to the Agreement, the Plans agreed to indemnify ED&F "fully and effectively [] against each liability, loss and cost which may be suffered or incurred by" ED&F in connection with "the Client Property, this Agreement, or the performance of [ED&F's] obligations under this Agreement." (Exs. A and B, at 16(a)(i)).

8. The Plans also agreed to indemnify ED&F "fully and effectively" against "any Tax for which [ED&F] is or may be liable or accountable in connection with the Client Property, this Agreement or the performance of [ED&F's] obligations under this Agreement (including without limitation the purchase and/or sale of Client Securities, the collection and/or realisation of coupons, dividends, interest or other payments, the receipt of or entitlement to receive any income, and the Custodian acting as or being deemed to be a trustee, branch, or agent of the Client) provided that this indemnity shall not extend to Tax on or attributable to any Fees." (Exs. A and B, at 16(a)(ii)).

9. ED&F has fully satisfied all of its obligations under the Agreement.

10. ED&F's Terms and Conditions of Business (the "Terms and Conditions") set out contractual terms governing the relationship between ED&F and the Plans, subject, where relevant, to any transaction-specific documentation. A true and correct copy of the Terms and Conditions is annexed hereto as Exhibit C.

11. The Plans agreed to be bound by, among other things, the Terms and Conditions. True and correct copies of letter agreements executed by the Plans are annexed hereto as Exhibits D & E.²

12. Pursuant to the Terms and Conditions, the Plans agreed, among other things, to indemnify ED&F against “any loss, liability, costs and expenses” incurred by ED&F “either directly or indirectly in the due performance of [ED&F’s] obligations” under the Terms and Conditions.

13. ED&F is entitled to complete indemnification by the Plans pursuant to the Agreements and/or the Terms and Conditions, including, without limitation, for all liabilities, losses and/or costs suffered or incurred in connection with (i) the Agreements and/or the Terms and Conditions; (ii) the performance of ED&F’s obligations under the Agreements and/or the Terms and Conditions; (iii) any tax reclaim applications submitted by or on behalf of the Plans for the Danish Transactions; and/or (iv) any action or proceeding—whether in this jurisdiction, in the English Action,³ or in any other proceedings—related to the Agreements, the Terms and Conditions, the performance of ED&F’s obligations under the Agreements and/or the Terms and Conditions, and/or any tax reclaim applications submitted by or on behalf of the Plans for the Danish Transactions.

² One of the letter agreements was accepted and agreed for and on behalf of Hamlyn LP. Del Mar was a limited partner in Hamlyn LP.

³ The “English Action” is the case titled *Skatteforvaltningen v. Solo Capital Partners LLP*, Nos. CL-2018-000297, CL-2018-000404 & CL-2018-000590 (2018), in the High Court of Justice, Business and Property Courts of England and Wales.

JURY DEMAND

ED&F demands a jury trial on all issues so triable.

REQUEST FOR RELIEF

WHEREFORE, Third-Party Defendant ED&F Man Capital Markets Ltd. respectfully requests that this Court enter judgment against Third-Party Plaintiffs Del Mar Asset Management Savings and Retirement Plan, Federated Logistics LLC 401K Plan, and David Freelove (collectively, the “Third-Party Plaintiffs”), as follows:

- i. Dismissing the Third-Party Complaint (MDL Dkt. No. 220) as against ED&F in its entirety;
- ii. Judgment in favor of ED&F against the Third-Party Plaintiffs;
- iii. Judgment ordering full and complete indemnification of ED&F;
- iv. An award of reasonable attorneys’ fees and costs; and
- v. Such other and further relief as the Court deems just and appropriate.

Dated: New York, New York
April 20, 2020

Respectfully submitted,

BINDER & SCHWARTZ LLP

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